Re M. A. ABDUL MAJEED.

[O. C. J. (Brown, Ag. C.J.) November 13, 1953]

[Singapore — Bankruptcy No. 36 of 1952]

Bankruptcy — Adjournment of hearing — Bankruptcy Rule 126 — Effect of non-compliance with Rule 126.

This was a bankrupt's motion to annul the Receiving and Adjudication Orders made against him on the ground that in adjourning the petition sine die Rule 126 was infringed. The petition was adjourned sine die in compliance with a joint request made by the bankrupt and the petitioning creditor, or a request by one of them with the concurrence of the other.

Rule 126 of the Bankruptcy Rules reads as follows:—

"After the expiration of one month from the day appointed for the first hearing of a petition (provided such petition shall have been duly served) no further adjournment of the hearing merely by consent of the parties shall be allowed except for the reasons set forth in Rule 119 of these Rules or for such other sufficient reason to be stated in the order for adjournment as the Court thinks fit; but in every such case unless an order for adjournment is made the Court shall either make a receiving order or dismiss such appointment."

When the petition was restored to the list the bankrupt himself did not receive notice of it.

Held: the bankrupt himself contributed to the infringement of Rule 126.

BANKRUPTCY.

P. F. X. Leonard for the bankrupt.

A. P. Godwin for the petitioning creditor.

Cur. Adv. Vult.

Brown, Ag. C.J. : — This was a bankrupt's motion to annul the Receiving and Adjudication Orders which were made against him on 2nd October 1953. The only point of substance, in my opinion, was that in adjourning the petition *sine die* on the 25th July 1952 Rule 126 was infringed, and that when the petition was restored to the list he himself received no notice of it. This case seems to emphasize the importance of Rule 126, and I thought it right to take time to consider the effect of non-compliance with that Rule.

In considering the exercise of my discretion to annul the Receiving and Adjudication Orders the following factors seem to me important:—

(1) The bankrupt himself contributed to the infringement of Rule 126. It was in compliance with a joint request made by him and the petitioning creditor, or a request by one of them with the concurrence of the other, that the petition was adjourned *sine die*.

(2) If Rule 126 had been drawn to the Court's attention it is certain that the Court would not have dismissed the petition. It would either have made a receiving order then, or if it had ordered an adjournment it would have stated in the order the reasons for it.

(3) When the petition was reinstated the petitioning creditor's solicitors notified the bankrupt's solicitors. The latter replied that they had no instructions. It seems to me that the bankrupt was to blame for the receiving order being made in his absence because with an adjourned petition pending he left no instructions with his solicitors and took no other step to see that he was informed of its reinstatement.

(4) His only disclosed assets are the three actions for $3,294.31 each. These assets are problematical; and his debt to the petitioning creditor alone is over $13,000.

(5) If he had attended on the 2nd of October 1953 it seems to me that there is nothing in his affidavit which would have caused the Court to dismiss the petition, and the Court would have adjudged him bankrupt. If that is so, there is no reason to annul the receiving and adjudication orders now.

There will be no order.

No order.

Solicitors for the bankrupt: *Sisson & Delay.*

Solicitors for the petitioning creditor: *Donaldson & Burkinshaw.*

YIM YIP KAE & ANOR. v. KWONG HOCK CHEONG SAWMILL & CO., LTD.

[O. C. J. (Aitken, Ag. J.A.) August 8, 1941]

[Singapore — Suit No. 36 of 1941]

Land laws — Ownership of land encroached by tidal water — Acquisition of foreshore by prescription — Easement — Presumption of lost grant in spite of Registration of Deeds Ordinance — Rights of riparian owners to tidal waterways.

The plaintiffs claimed to be the owners of the whole of the area known as Lot 171 situated at Kallang. This lot was granted to their first predecessor in title in 1858 and the whole lot must then have consisted of dry land. By gradual and imperceptible encroachment of the tidal water, the lot had been reduced to its present condition of river bed, foreshore and dry land — the dry land being less than a fourth of the total area. The plaintiffs bought over the lot in 1933 and when they went into occupation they found the defendants and 2 other Sawmills were using those parts of the lot which consisted of waterways for the purpose of conveying logs to their wharves and also those parts which were covered with water at high tide but left uncovered at low tide for the purpose of storing their logs.

The defendants claimed that they had become owners by prescription of those parts whereon they deposited their logs for storage by reason of adverse possession.

Alternatively they claimed to have acquired by prescription a right or easement to deposit their logs thereon. With regard to those parts referred to in the judgment as "Branch of the Kallang River" and "waterways", they claimed their right to navigate and ply their craft over these channels either as riparian owners or as members of the general public.

On the first issue whether the plaintiffs were the owners of the whole of Lot 171,

Held, following **In the matter of the Hull and Selby Railway**(1): if the sea or the water in a tidal river, by gradual and imperceptible progress, encroaches upon the land of a subject all the land thereby covered with water at high tide becomes the property of the Crown.

Assuming that this conclusion was wrong and that the plaintiffs were the owners of the whole of Lot 171, the Court went on to decide the second issue whether the defendants had acquired a prescriptive title to the foreshore by reason of their continued acts of possession.

Held: in order to acquire a title by prescription there should be a great volume of evidence of almost every kind of act of ownership.

The defendants and their predecessors in title had never claimed or exercised any other rights over those parts except the right to use the tidal water when it covered them for the purposes of conveying their logs.

Held: the use which the defendants and their predecessors in title had made of the parts referred to as "Kwong Hock Cheong encroachment" for more than twenty years before action brought, openly as of right and without payment to anyone had resulted in the acquisition by them of an easement to deposit their logs there for storage purposes without any need to presume a lost grant.

Held further, following the **Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.**(8): if the acquisition of such an easement must be founded on the fiction of a lost grant then a lost grant should and must be presumed in spite of the Registration of Deeds Ordinance and its predecessors.

On the next issue regarding the use of the "Branch of the Kallang River".

Held: the "Branch of the Kallang River" is a navigable and tidal waterway over which the public have a right to navigation, and the defendants as riparian owners are entitled to the enjoyment of the water which washes their wharf.

Held further: the defendants as riparian owners and as members of the general public, are entitled to navigate their craft over the two "waterways" referred to at all times and states of the tide.

Cases referred to:—

(1) *In the matter of the Hull & Selby Railway* 151 E.R. 139.

(2) *Attorney-General v. Chambers,* 4 De G. & J. 55.

(3) *Mellor v. Walmesley,* (1904) 2 Ch. 525.

(4) *Mercer v. Denne,* (1905) 2 Ch. 538.

(5) *Lord Advocate v. Lord Blantyre* (1879), 4 App. Cas. 770, H.L.

(6) *Lord Advocate v. Young* 12 App. Cas. 544, H.L.

(7) *Jones v. Williams* 2 M. & W. 326.

(8) *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.* (1915) A.C. 599.

(9) *Attorney-General v. Lim Chin Swi,* 9 S.S.L.R. 6.

(10) *Angullia v. Ong Boon Tat,* 15 S.S.L.R. p. 190.

(11) *Yong Joo Lin v. Fung Poi Fong* (1941) M.L.J. 63.

(12) *Sim E. Bak v. Ang Yong Huat* (1923) A.C. 429.

(13) *Chasemore v. Richards* 7 H.L.C. 382.

(14) *Lyon v. Fishmongers' Company,* 1 App. Cas. 662.

(15) *Attorney-General v. Parmeter,* 24 R.R. 723.

(16) *Gann v. Free Fishers of Whitstable* (1865), 11 H.L. Cas. 192.

(17) *Liverpool & North Wales Steamship Co. v. Mersey Trading Co.* (1908) 2 Ch. 460.

(18) *R. v. Ward,* (1836) 4 A & E 384.

(19) *Mayor of Colchester v. Brooke* (1845) 7 Q.B. 373.

(20) *Attorney-General for the Straits Settlements v. Wemyss* (1888), 13 A.C. 192, P.C.

(21) *Mellor v. Walmsley* (1905) 2 Ch. 164.

(22) *Coppinger v. Shehan,* (1906) I Ir. R. 519.

ACTION.

N. A. Mallal for the plaintiffs.

Roland Braddell for the defendants.

Cur. Adv. Vult.

Aitken, Ag. J.A. : — The plaintiffs claim to have become the owners of Lot No. 171 of (Singapore) Town Sub-division XVII in the year 1933. It comprises altogether 7 acres 1 rood and 30 poles by the latest admeasurement, but of that total area rather more than three-fourth are covered by water at high tide and something like one third is covered by water at low tide. Indeed, the only part thereof which is above high water mark and can properly be described as dry land is that demarcated and coloured white on the plan attached to the Statement of Claim. The plaintiffs' residence, warehouses and offices are erected on that part.

Such is the present condition of Lot 171, and the evidence led before me has proved it to be of no recent growth, but to have existed continuously for the last forty years at least, and in all probability for a considerably longer period than that, without any appreciable change.

It seems reasonably clear, however, that when Lot 171 was granted by Government to the plaintiffs' first predecessor in title in the year 1858, it then consisted

wholly of land above high water mark. There is no direct evidence on the point, and no early plan of the area lying to the north of Lavender Street has been produced; but I think it can safely be presumed that the Government of the day would not have granted several acres consisting of nothing but foreshore and the bed of a navigable waterway to a subject. Moreover, the rough plan drawn on the back of the deed of the 16th of November, 1858, supports this presumption, because it shows Lot 171 as surrounded on every side by land granted to other persons. At the present day the land to the north of Lot 171 is wholly covered by water at high tide, and it is almost inconceivable that any one could have occupied it, or made any other use of it, in the year 1858 if it was then in the same condition.

Having arrived at this conclusion I must next consider how and when the dry, or comparatively dry land which was apparently comprised in the grant of the 16th of November, 1858, became the Lot 171 which we know to-day.

Here again there is no direct evidence on the point, apart from the fact that there are no works of man to account for the change. We can therefore I think, safely assume that it has been brought about by natural causes, but that is not enough. I must go further and decide whether the change under consideration was slow and imperceptible, or sudden and obvious since the legal results which flow from these two kinds of changes are so very different.

Such evidence as there is as to how this change came about is in favour of its having been slow and imperceptible. In the first place there appears to be no record of any sudden incursion of the sea in this area of the island. In the second place we have Mr. C. V. Boswell's evidence that there has been considerable encroachment by the sea on parts of the East Coast of the Island, and his agreement with the suggestion that a comparison of the rough plan drawn on the back of the grant of the 16th November, 1858, with the plan (pl.) which he himself had prepared of Lot 171 in its present condition, shows that "the sea has heavily encroached on what must have been dry land in 1858."

The period of the time during which the change took place cannot be stated with any close approach to accuracy. From what I have already said it must have begun after the year 1858 and, since I accept the evidence of the defendants' witnesses Low Phui Hung, Chew Tow and Kong Cheong Fatt as being truthful and correct, it must have ended on some date before the end of last century.

These preliminary findings of fact are necessary to a proper understanding of the issue raised in this action and the causes underlying those issues. In effect I have found that whereas Lot 171 was dry land, or at any rate land above high water mark in the year 1858, it had assumed its present condition of river bed, foreshore and dry land — the dry land being rather less than a fourth of its total area — by the end of last century as the result of a gradual and imperceptible encroachment of tidal water.

Apart from the name of the first grantee, I have no information about the ownership of Lot 171 during the period 1858 to 1933, and no information at all as to its user and occupation during that period. By two deeds of conveyance dated respectively the 15th and 29th of June, 1933, Lot 171, in so far as it was possible for one subject of the Crown to convey it to another in its present condition, was conveyed to the plaintiffs as joint tenants in fee simple.

When the plaintiffs went into occupation of the dry part of the Lot 171, they found no fewer than three Sawmill Companies in active operation to the south west of them, and all within a distance of some 300 yards measured from the western border of their own dry land. All those three Sawmill Companies were using those parts of Lot 171, which consist of waterways for the purpose of bringing unsawn logs to their wharves and for the purpose of exporting sawn planks therefrom; and all of them were using those parts of Lot 171 which are covered with water at high tide, but left uncovered at low tide, for the purpose of storing their logs until required for action in the mill.

This practice in regard to the storage of their logs very soon led to disputes between the plaintiffs and these three sawmill neighbours and one more further to the south west, and as the defendants were and are the nearest of those neighbours, they seem to have borne the brunt of the plaintiffs' displeasure. From the agreed correspondence I gather that various proceedings, both civil and criminal, were taken by the plaintiffs against the defendants, with a view to putting an end to any user of Lot 171 by the latter, before this action was launched. I have no information as to the exact nature or scope of those proceedings, but they seem to have been uniformly unsuccessful.

Now in order to explain the issues of law and fact raised by the pleadings in this action in their final form, I must refer to some plan showing Lot 171, and the plaintiffs' and defendants' premises, and their immediate neighbourhood. To my mind the plan in evidence as Exhibit C is the best plan for the purpose, and both sides have admitted it to be accurate subject to reservations on Mr. Mallal's part as to the correctness of the following three statements endorsed thereon: — "Branch of Kallang River", "Waterway"

and "Waterway". As I consider those statements to be both correct and helpful in making the matter clear, I shall use them to describe what they are intended to describe. It is worthy of notice, too, that the first plaintiff agreed that "Branch of Kallang River" is correct.

The issues of law and fact raised by the pleadings are by no means simple; it will be best to take them one by one.

Firstly, the plaintiffs say that they are the owners and occupiers of the whole area comprised in Lot 171, whereas the defendants say that the only part of Lot 171 which is owned and occupied by the plaintiffs is the dry land part thereof in the South Eastern corner of the Lot coloured white on Plan C.

Secondly, the defendants claim that they have become the owners of those parts of Lot 171 which are coloured yellow and marked "Encroachment Kwong Hock Cheong" on Plan C, and on which they deposit their logs for storage as I have already mentioned, by reason of adverse possession thereof for a period exceeding 12 years. The plaintiffs admit the deposit of the logs and that the defendants make this claim, but say that both are wrongful. They also do not admit that the defendants have been in adverse possession of any part of Lot 171.

Thirdly, and as an alternative to their claim of a prescriptive title to those parts of Lot 171 which are coloured yellow and marked "Kwong Hock Cheong Encroachment" on Plan C, the defendants claim that they have acquired a right to deposit their logs on those parts by the exercise of such a right openly and without interference from the plaintiffs or their predecessors in title, for more than 20 years before action brought. This plea must be deemed to have been denied and put in issue by virtue of the provisions of Order 28 Rule 13 of our Rules of the Supreme Court.

Fourthly, the defendants say that they and their predecessors (in title) have habitually and continuously used the "Branch of Kallang River" channel shown on Plan C. for conveying logs and plying craft between the Kallang river and their sawmill "for upward of 40 years last passed." The plaintiffs admit that the defendants have "habitually" made such use of the "Branch of Kallang River" channel, but plead that they have on several occasions requested the defendants to desist from doing so, and claim an injunction to restrain them from continuing to do so.

Fifthly, the defendants claim that they have a right to use the water over any part of Lot 171 for the purposes of transporting their logs and plying their craft. The plaintiffs admit that the defendants have made this claim, but plead that it is wrongful. There are two alternative grounds alleged in support of this claim :—

(a) that the plaintiffs are not the owners of those parts of Lot 171 which are covered with water at high tide; and

(b) that the defendants have acquired a right to make such use of the water over any part of Lot 171 by the exercise of such a right openly, and without interference from the plaintiffs or their predecessors in title, for more than 20 years before action brought.

It will be observed that in every issue but one the defendants are those who claim and the plaintiffs are those who deny. The position is a curious one, but Mr. Mallal no doubt had good reason for drawing the plaintiff's statement of claim the way it is drawn, and for refraining from including therein any claim for possession.

I think that the most convenient course for me to adopt will be to decide all issues of pure fact which have been raised by the pleadings first of all, and then proceed to deal with all other issues which have been raised during the hearing, whether of mixed law and fact or of law pure and simple. In regard to the issues of pure fact, I am in an exceptionally favourable position, because every witness who gave evidence before me impressed me as being honest and truthful. In a hard fought case like this, it is a rare and refreshing experience for a Judge to end up with a favourable impression of every witness who has appeared before him in the witness box.

I should mention, too, that I have visited the plaintiffs' and defendants' premises on at least half a dozen occasions, and at various stages of the tide including both high and low; and that I have inspected the whole area from above on more than a dozen occasions and similarly at various stages of the tide. It is submitted that a Judge may use his own eyes, not for the purpose of obtaining new evidence, but for the purpose of checking up on the evidence already before him.

Now the first issue of pure fact with which I will deal is this : — Have the plaintiffs been in physical occupation of, or have they exercised any acts of ownership over, any part of Lot 171, except the dry land part thereof coloured white on Plan C, since the month of June, 1933?

To my mind all the evidence on the question raised in that issue points irresistibly to an answer in the negative. On one or two occasions during the period under consideration the plaintiffs sought to interfere with the use by the defendants and others of some of those parts of Lot 171 which are permanently or temporarily covered with water by erecting stakes or fences on or close to them; but on each occasion the

defendants and others immediately removed those stakes or fences claiming as of right to do so. According to the evidence before me those abortive attempts constituted the only acts of occupation, or of ownership, attempted by the plaintiffs since 1933 onwards in respect of the wet area comprised in Lot 171, and they obviously failed to effect their purpose or anything else.

The second issue of pure fact seems to be this : — What acts of possession, if any, have the defendants and their predecessors in title exercised over any part of Lot 171, and if so, what part, for any period of years, and if so, for what period?

On this issue, I accept, without hesitation, the evidence of the defence witnesses Tang Choo Yam, Low Phui Hung and Chew Tow. And their evidence has satisfied me that for at least 40 years immediately preceding the commencement of this action the defendants, or their predecessors in title, have used those parts of Lot 171 which are coloured yellow and marked "Encroachment Kwong Hock Cheong" on Plan C for the purpose of storing their logs until required at the mill itself. I am also satisfied that such user has throughout been open, as of right, and without payment of any rent or fee to any one else.

The third issue of pure fact may be stated thus : — Have the defendants, and their predecessors in title, exercised a right to deposit their logs on those parts of Lot 171 which are coloured yellow and marked "Kwong Hock Cheong Encroachment" on Plan C, openly and without interference from the plaintiffs or their predecessors in title, for more than 20 years before the commencement of this action. It is really an alternative way of stating the second of these issues, and the evidence in support of the one is the same as the evidence in support of the other. I am satisfied that the answer to the question raised by this issue is in the affirmative.

The fourth issue of pure fact raised by the pleadings appears to be this : — Have the defendants and their predecessors in title habitually, and continuously, used the "Branch of Kallang River" channel shown on Plan C for conveying logs, and plying craft, between Kallang river and their sawmill, for more than 40 years before the commencement of this action? I find as a fact that they have done so, and the evidence of Tang Choo Yam, Low Phui Hung, Chew Tow and Cheong Ah Thiam seems to me to be absolutely conclusive on the point. The plaintiffs themselves admit everything necessary to support this finding except the length of this action.

The fifth and last issue of pure fact may be stated this : — Have the defendants and their predecessors in title openly, and without interference from the plaintiffs or their predecessors in title, plied their craft and transported their logs over any, and if so what, parts of Lots 171 other than the Branch of Kallang River shown on Plan C, for more than 20 years before the commencement of this action?

Upon this issue the uncontradicted evidence of Tang Choo Yam, Low Phui Hung and Chew Tow has satisfied me that for at least 40 years before the commencement of this action the defendants, and their predecessors in title, have transported their logs over both the areas which are coloured yellow and marked "Encroachment Kwong Hock Cheong" on Plan C, and over both the "waterways" shown thereon, openly and without interference from the plaintiffs or their predecessors in title.

I am also satisfied, by the same evidence, that the defendants, and their predecessors in title, have in the same manner, and for the same period, plied their craft over both the waterways shown on Plan C; but I doubt very much whether it is possible to ply any craft, except, perhaps, a light sampan, over the two areas coloured yellow and marked "Encroachment Kwong Hock Cheong" on Plan C. Even the "waterways" can only be used by craft of any considerable draft at high tide, and at dead low tide about the only craft one could float in the greater part of them would be something in the nature of a toy or a paper boat. I am therefore unable to find, as a fact, that the defendants and their predecessors in title have plied their craft over the two areas coloured yellow and marked "Encroachment Kwong Hock Cheong" for more than 20 years before action brought. They may have plied light sampans over parts of such areas for such a period, but the evidence led before me does not, in my opinion, amount to proof of such an user.

So far I have experienced no great difficulty in performing the judicial function of arriving at a decision, but now that I must pass from fact to law the going will, I fear, become progressively harder. To begin with, I must endeavour to formulate the issues of law which arise, or are said to arise, for my decision.

The first of them appears to be this : — Are the plaintiffs the owners and/or occupiers of any part of Lot 171 except that which is coloured white on Plan C?

The second of them appears to be : Have the defendants obtained a title by prescription to any part, and if so what part, of Lot 171?

The third of them may be stated thus : — Have the defendants acquired, by prescription, any right or easement to deposit their logs for storage purposes on any part, and if so what part, of Lot 171?

The fourth of them may be stated in this way: — Are the defendants, either as riparian owners or as members of the general public, entitled to navigate or ply their craft over the "Branch of Kallang River" shown and marked on Plan C?

The fifth of them appears to be this: Are the defendants entitled to navigate or ply their craft over the two "waterways" marked and shown on Plan C either as riparian owners, or as members of the general public?

Now the first of these issues of law seems to be concluded by the decision of the Barons of the Exchequer in *In the matter of the Hull & Selby Railway*[1] which has been approved by Lord Chelmsford in *Attorney-General v. Chambers*[2], applied in *Mellor v. Walmesley*[3], and *Mercer v. Denne*[4], and cited as a well established authority in half a dozen other cases. That case appears to have decided that if the sea, or the water in a tidal river, by gradual and imperceptible progress, encroaches upon the land of a subject, all the land thereby covered with water at high tide becomes the property of the Crown. I have already explained why, in my opinion, Lot 171 assumed its present condition of river bed, foreshore and dry land between the year 1859 and the end of last century as the result of a gradual and imperceptible encroachment of tidal water. As to occupation, it is sufficient to remark that there is no evidence whatsoever of any occupation by the plaintiffs of those parts of Lot 171 which are under water either permanently or at high tide.

In view of my decision on the first of these issues of law the second of them cannot, in my opinion, be decided in any action to which the Attorney-General, as representing the Crown, is not a party. However, if I am wrong in holding that the plaintiffs are not the owners of any part of Lot 171 except that which is coloured white on Plan C, and if it can be assumed that the plaintiffs' predecessors in title were, at the beginning of this century, the owners of the whole of Lot 171 in spite of the encroachment thereon of tidal water, the second issue of law would arise for decision.

Upon these assumptions then, and because I have been asked to deal with all the issues of fact and law raised in this case, I will express a rather hesitant view on this issue. My hesitancy arises from the fact that the defendants' acts of possession are all of one nature and character, and from my study of the cases of *Lord Advocate v. Lord Blantyre*[5] and *Lord Advocate v. Young*[6] in both of which the House of Lords was considering claims of title to foreshore founded on continued acts of possession.

In the former of these cases Lord Blackburn said at pages 791 and 792 of the report:—

"Every act shewn to have been done on any part of that tract by the barons or their agents which was not lawful unless the barons were owners of that spot on which it was done is evidence that they were in possession, as owners, of that spot on which it was done. No one such act is conclusive, and the weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being, whether the act was such and so done that those who were interested in disputing the ownership would be aware of it. And all that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be had of it, and what kind of possession was proved. This is what is very clearly explained by Lord Wensleydale (then Baron Parke) in Jones v. Williams[7] at p. 33. And as the weight of evidence depends on rules of common sense, I apprehend that this is as much the law in a Scotch as in an English Court. And the weight of the aggregate of many such pieces of evidence taken together is very much greater than the sum of the weight of each such piece of evidence taken separately.

Now, in the present case, there is a great volume of evidence of almost every kind of act of ownership. Some of them are, if they stood alone, not of great weight. Some are very weighty indeed."

In the latter case Lord Watson said at p. 533 of the report:—

"It is, in my opinion, practically impossible to lay down any precise rule in regard to the character and amount of possession necessary in order to give a riparian proprietor a prescriptive right to foreshore. Each case must depend upon its own circumstances. The beneficial enjoyment which the foreshore admits, consistently with the rights of navigators and of the general public, is an exceedingly variable quantity. I think it may be safely affirmed that in cases where the seashore admits of an appreciable and reasonable amount of beneficial possession, consistently with these rights, the riparian proprietor must be held to have had possession, within the meaning of the Act 1617, c. 12 if he has had all the beneficial uses of the foreshore which would naturally have been enjoyed by the direct grantee of the Crown. In estimating the character and extent of his possession it must always be kept in view that possession of the foreshore, in its natural state, can never be, in the strict sense of the term, exclusive. The proprietor cannot exclude the public from it at any time; and it is practically impossible to prevent occasional encroachments on his right, because the cost of preventive measures would be altogether disproportionate to the value of the subject."

As I read the evidence in this case the defendants, and their predecessors in title, have been quite content, to let the plaintiffs, and their predecessors in title exercise any rights of ownership over those parts of Lot 171 coloured yellow and marked "Kwong Hock Cheong Encroachment" on Plan C which are compatible with the former's claim to use those parts for the deposit and storage of their logs as and when they please.

So far as I can gauge the position the defendants, and their predecessors in title, have never claimed or exercised any other rights over those parts of Lot 171, except, of course, the right to use the tidal water, when

it covers them, for the purpose of transporting their logs. In these circumstances, and upon the assumptions I have already made, I should hold that the defendants have not obtained a title by prescription to any part of Lot 171. In this case there is not that "great volume of evidence of almost every kind of act of ownership" that there was in *Lord Advocate v. Lord Blantyre*[5].

Upon the same assumptions, however, I should unhesitatingly decide the third issue of law in favour of the defendants, and hold that they have acquired a prescriptive right to deposit their logs for storage purposes on those parts of Lot 171 which are coloured yellow and marked "Kwong Hock Cheong Encroachment" on Plan C. I have already found the facts relevant to this issue entirely in favour of the defendants, and a prescriptive claim to a very similar right of easement was upheld by the Privy Council in *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.*[8].

The only obstacle in the way of a just and reasonable decision on this third issue of law is the purely technical argument that no easement can be acquired by long user in the Straits Settlements because (1) Lord Tenterden's Prescription Act of 1832 does not apply here, and (2) the Courts cannot presume a lost grant because, if there had been a valid grant of such an easement, it would have been registered in accordance with the law for the time being relating to the Registration of Deeds.

A modern judge is apt to get a little impatient with unmeritorious defences, founded on mediaeval history and legal fictions which have outlived their day, but I am faced with two decisions of the local High Court—*Attorney-General v. Lim Chin Swi*[9] and *Angullia v. Ong Boon Tat*[10], which do lay down the law to be that no easement can be acquired in these settlements by long user for the reasons set out immediately above.

In spite of my impatience, however, I should have followed these decisions, since they have stood unchallenged for the last 20 years, as a matter of judicial comity, had it not been for the recent decision of the F.M.S. Court of Appeal in *Yong Joo Lin v. Fung Poi Fong*[11] and for that part of the Judgment of the Privy Council in *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.*[8] which presumed, in the respondent's favour, a lost irrevocable licence from the Crown to erect buildings and store goods upon certain reclaimed land, and use it generally for the purposes of their business. From my own knowledge I know that Ordinance making the registration of all deeds compulsory have been in force in that part of Nigeria which was formerly known as Southern Nigeria for some considerable time, and from a perusal of the 1923 edition of the Laws of Nigeria I gather that some such system was in force as early as 1883, and possibly as early as 1869. There is a passage in their Lordships' judgment at p. 620 of the report which seems to show that their Lordships were not troubled by the fact, or probability, that the irrevocable licence they were presuming in the respondents' favour would have been, to quote their own words "duly recorded", had it really existed.

For the reasons above stated it seems to me that the case of *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.*[8] does support Mr. Braddell's argument that an easement can be acquired by prescription in these Settlements even though no valid grant thereof can, in point of fact, be lost so long as the Law in relation to the Registration of Deeds continues as it is to-day. I am also very attracted by the reasoning of Terrell, Ag. C.J., S.S., in the case of *Yong Joo Lin v. Fung Poi Fong*[11] at pages 65, 66 and 67 of the report, and incline to the view that the use which the defendants' and their predecessors in title have made of the yellow areas on Plan C for more than 20 years before action brought, openly, as of right and without payment to any one, has resulted in the acquisition by them of an easement to deposit their logs there, for storage purposes without any need to presume a lost grant. But if the acquisition of such an easement must be founded on the fiction of a lost grant, then I think that a lost grant should and must be presumed in spite of the Registration of Deeds Ordinance and its predecessors.

The fourth issue of law requires some further examination of the evidence.

The "Branch of Kallang River" referred to on Plan C joins the main channel some 300 yards or so above Kallang Bridge. From a point about 40 yards west of the defendants' premises, to its junction with the Kallang river proper, this channel is a well defined waterway over which I have seen tongkangs or twakows of considerable size navigating at low water. Its natural flow, at low water, is first in an East by North East and then in an Easterly direction.

From the point which I have roughly estimated at 40 yards to the West of the defendants' premises this "Branch of Kallang River" waterway becomes three separate and divergent waterways, each of which is clearly visible even at dead low tide from above, and each of which appears to serve sawmills situate in Kallang Road, Lavender Street, and the junction of Lavender Street and Bendemeer Road respectively, all of which mills are marked on Plan B. I have inspected

all these mills and found a wharf at each of them in active use.

From the evidence in this case, and what I myself have seen, I am satisfied that this "Branch of Kallang River" waterway is used by at least six sawmills, and one other mill, for the purposes, of their businesses. Tongkangs and twakows of considerable size do undoubtedly navigate this waterway as far as the defendants' wharf, and I have seen several at the wharves of the other mills situate well to the West of the defendants' premises as shown on Plan B.

Boat builders also appear to use this waterway, and I have seen one large tongkang in course of construction at the defendants' premises and another one of considerable size, but not so large, about one hundred yards to the West of them. It is, in my opinion, a natural waterway and not a purely artificial one as in the case of *Sim E. Bak v. Ang Yong Huat*[12] and I am quite certain from what I have seen, time after time, that there is no deep water channel from West to East just to the North of it as was suggested by Mr. Mallal in cross examination. Apparently that suggestion is founded on the Plan which Mr. Mallal succeeded in getting in evidence as Exhibit F., but I have been unable to reconcile some of the water channels portrayed on that plan with the appearance of the area in question at low tide and from above.

Upon the best consideration which I can give this problem, and I have not spared either time or trouble in my efforts to solve it correctly, it appears to me that the "Branch of Kallang River" marked on Plan C. is a navigable and tidal waterway, and that the public have a right to navigation over it extending from the main channel of the Kallang river to places several hundred yards to the West and North West of the defendants' premises. At high tide the defendants wharf is washed by the tidal waters of this branch of Kallang river waterway, and I hold that they are riparian owners entitled to the enjoyment of the water which washes their wharf in its natural flow and quantity and free from deliberate obstruction: see *Chasemore v. Richards*[13] and *Lyon v. Fishmongers' Company*[14].

To my mind the fifth and last of the issues of law falls to be decided in favour of the defendants.

The greater part of the two "waterways" marked and shown on Plan C consist of foreshore, that is, of land which is alternatively covered and uncovered by the ordinary flux and reflux of the tides. I have found, as a fact, that the defendants, and their predecessors in title, have plied their craft over both these waterways, openly and without interference, for at least 40 years before action brought. Another fact is that these areas are mostly foreshore, and, where not foreshore, consist of land permanently covered with water which, for all practical purposes, forms a part of the "Branch of Kallang River" marked and shown on Plan C, and that fact affords a firm legal basis for the exercise of such a right of navigation.

Whoever may be the owner of the soil in these "waterways" such ownership, even though vested in the Crown, is subservient to the public right of navigation and must not be used in any way to derogate from or interfere with that right: see *Attorney-General v. Parmeter*[15], *Gann v. Free Fishers of Whitstable*[16], *Liverpool & North Wales Steamship Co. v. Mersey Trading Co.*[17].

The right of navigation extends over every part of a navigable river (*R. v. Ward*[18]), and in the case of *Mayor of Colchester v. Brooke*[19] it was held that the right of passage in a river exists at all times and states of the tide, and that it is no excess of this right if a vessel, which cannot reach its destination at a single tide, remains aground till the tide serves.

In that case Lord Denman, C.J., delivering the Judgment of the Court of Queen's Bench, said:—

"Now, if, in such rivers (i.e., navigable tidal rivers), it was held that the character (i.e., of being public and navigable in the sense of a highway) did not extend higher up than the water sufficed to float vessels at all times, or was suspended during such periods of the tide as left the channel too shallow for that purpose, rights of the public invaluable and immemorial in numerous rivers would be abridged and rendered in many particulars vexatiously uncertain, and in many cases be made nearly, if not entirely, useless.....to say, then, that the river ceased to be navigable, ceased to be a highway, at the ebb or other states of the tide when such vessels could not float, is in effect to say, that except for a short period of every month, they should not use the river at all for the purpose of trading with Colchester. It is more reasonable to hold that the term navigable is a relative and comprehensive term containing within it all such rights upon the waterway as, with relation to the circumstances, are necessary for the full and convenient passage of vessels and boats along the channel. The right of soil in arms of the sea and public navigable rivers, which the Crown prima facie has, independently of any ownership in the adjoining lands must be in all cases, considered as subject to the public right of passage, however acquired; and any grantee of the Crown must, of course, take subject to such right."

The following passage from page 54 of the fifth edition of *Coulson & Forbes on The Law of Waters and of Land drainage* is also very much in point:—

"In the case of Attorney General for the Straits Settlements v. Wemyss[20], the Judicial Committee have laid down that the right of the proprietor in the foreshore is subject to the obligation of allowing the owner or occupier of lands adjoining the sea free access and egress to and from the sea to his lands, and that the rule laid down in Lyon v. Fishmongers Co.[14], equally applied to tidal rivers and to the sea. This free right of access is from every part of the frontage over every part of the foreshore Mellor v. Walmsley[21], and is not limited to the period of the day when the sea is in contact with the land, but includes a private right of access to the sea across the portion of the foreshore left bare by the receding tide (Coppinger v. Shehan[22], and Lyon v. Fishmongers' Company[14], ubi supra). Any obstruction

of this right will be restrained by injunction (Coppinger v. Shehan[22], and Lyon v. Fishmongers' Co.[14], ubi supra)."

Basing my opinion on all these authorities I have no difficulty in holding that the defendants, both as riparian owners and as members of the general public, are entitled to navigate their craft over so much of both the "waterways" marked and shown on Plan C. as lie within the boundaries of Lot 171. I cannot, in this action, make any declaration about the more southern parts of these "waterways" which are outside the southern boundary of Lot 171, but I think I can and should here affirm what I have already said in connection with another issue, and that is, that the defendants are entitled to free access from the "Branch of Kallang River" marked and shown on Plan C to their wharf which is situate at the southern end of the right hand waterway.

And now I feel that I have dealt with every important point raised in this case, but I do recall that Mr. Mallal was, for some time, asking questions designed to show that the "waterway" leading to the defendants' wharf was an artificial one which had been dredged or dug out by their workmen.

In my opinion this waterway is, in all probability, a natural waterway; but I do accept the first plaintiff's statement that he has, on occasion, seen the defendants' employees removing mud debris from the same at low water.

The true explanation of what the first plaintiff saw is, I think, to be found in the evidence of the defendants' witness Low Phui Hung where he says — "at times we have removed tree barks from the channel, that is, tree barks which have fallen from the logs into the channel." It is common ground that all the bark is chipped off the thousands of logs used by the defendants whilst they are stored on the "Kwong Hock Cheong Encroachment" areas, and before they are drawn into the mill. I myself have seen that preliminary bark chipping in progress and the process does undoubtedly lead to a considerable accumulation of debris which would, probably, choke the "waterway" leading to the defendants' wharf were it not removed from time to time.

Judgment for the defendants.

Solicitors for the plaintiffs: *Mallal & Namazie.*

Solicitors for the defendants: *Braddell Bros.*

WONG POOH YIN v. PUBLIC PROSECUTOR.

[C. A. (Mathew, C.J., Wilson and Buhagiar, JJ.) November 12, 1953]

[K.L. — F.M. Criminal Appeal No. 57 of 1953]

Emergency Regulations, 1951, reg. 4(1)(a) — Carrying arms without authority and without lawful excuse — Strict liability — Meaning of "lawful excuse".

The main question in this appeal was whether a terrorist caught in possession of a firearm can be said to have a lawful excuse for carrying the firearm if it can be shown that he was on his way to surrender and that he was carrying it for the purpose of taking it to the police.

Held: in cases of absolute prohibition a man cannot change the nature of his act from an unlawful one to a lawful one, by a mere change in his intention. Even accepting the bona fides of the appellant's intention to surrender, this could not constitute a lawful excuse within the meaning of the regulation.

Cases referred to:—

(1) *Dickins v. Gill* (1896) 2 Q.B. 310.

(2) *Winkle v. Wiltshire* (1951) 1 T.L.R. 368.

CRIMINAL APPEAL.

K. K. Benjamin for the appellant.

P. G. Clough for the respondent.

Cur. Adv. Vult.

Mathew, C.J. : — The appellant was convicted of carrying a revolver without lawful authority contrary to regulation 4(1)(a) of the Emergency Regulations, 1951, and was sentenced to death. Mr. Benjamin who appeared for the appellant has made two submissions:—

(i) the learned trial Judge did not adequately or at all direct the assessors on the question of "lawful authority" and "lawful excuse";

(ii) the learned trial Judge was wrong in not directing the assessors that if they thought that the appellant was attempting to surrender he had a lawful excuse for carrying the revolver.

Regulation 4(1)(a) reads:—

"Any person who **without lawful excuse, the onus of proving which shall be on such person,** carries or has in his possession or under his control —

(a) any fire-arm, without lawful authority therefor .....shall be guilty of an offence and shall on conviction be punished with death."

(The words underlined were added by L.N. 363 of 1.7.52.)

The regulation aims at the absolute prohibition of the carrying, possessing or controlling of fire-arms, ammunition and explosives except under licence or by members of the security forces or by persons exempted from the provisions of the regulation. A person carrying, possessing or controlling a fire-arm without authority can only avoid conviction if he can prove that he has a lawful excuse for contravening the regulations. The regulation contemplates an absence of lawful authority being cured by lawful excuse.